Supreme Court, U.S.
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No. 92-314

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

LAURYN AGNEW BIERDEMAN,

*Petitioner,*

v.

SHEARSON LEHMAN HUTTON INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether petitioner Lauryn Agnew Bierdeman must arbitrate the claims which she has asserted against respondent Shearson Lehman Hutton Inc. under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), pursuant to the dictates of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1990) ("FAA")?

## RULE 28.1 LIST

## PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF SHEARSON LEHMAN BROTHERS INC.

*Parent Companies*

American Express Company
Shearson Lehman Brothers Holdings Inc.

*Subsidiaries*

Boston Safe Deposit and Trust Company
Lehman ABS Corporation
Lehman CMO Inc.
Lehman Pass-Through Securities Inc.
Structured Asset Securities Corporation

*Affiliates*

American Centurion Life Assurance Company
American Enterprise Investment Services Inc.
American Express Bank Ltd.
American Express Centurion Bank
American Express Company
American Express Credit Corporation
American Express Information Services Corporation
American Express Master Trust
American Express Overseas Credit Corporation Limited
American Express Overseas Credit Corporation N.V.
American Express Overseas Credit Corporation S.A.
American Express Overseas Finance Company N.V.
American Express Receivables Financing Corporation
American Express Resource Corporation
American Express Travel Related Services Company, Inc.
Amex Life Assurance Company
First Data Corporation
Grahams Rintoul Investment Trust, plc
IDS Bank & Trust
IDS Certificate Company
IDS Deposit Corp.
IDS Financial Corporaiton

*Affiliates (continued)*

IDS Financial Services Inc.
IDS Life Account Re
IDS Life Insurance Company
IDS Life Insurance Company of New York Accounts 4,5,6,7,8 and 9
IDS Life Insurance Company Accounts F,G,H and N
IDS Life Variable Account for Shearson Lehman
IDS Life Variable Annuity Funds A and B
IDS Life Variable Life Separate Account
IDS Managed Futures, L.P.
IDS Securities Corporation
International Corporate Bank, The
Lucchetti S.A.
Mercer Allied Corporation
Shearson Lehman Brothers Holdings PLC
Source One Mortgage Services Corp.

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## STATUTORY PROVISIONS INVOLVED*

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Section 3, 9 U.S.C. § 3

*Title VII of the Civil Rights Act of 1964*

42 U.S.C. § 2000e *et seq.* (1982)

* The complete text of these provisions is reproduced at Appendix A hereto.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 1992 U.S. App. LEXIS 13271 and is reproduced at Appendix B hereto. The opinion of the United States District Court for the Northern District of California is reported at 744 F. Supp. 211 and is reproduced at Appendix D hereto.

### JURISDICTION

The judgment of the court of appeals was entered on May 28, 1992 and is reproduced at Appendix C hereto. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

## STATEMENT OF THE CASE

Petitioner Lauryn Agnew Bierdeman ("Ms. Bierdeman" or "petitioner") commenced this action by serving respondent Shearson Lehman Hutton Inc. ("Shearson") with a complaint, on or about January 3, 1990. The complaint asserts that employees of Shearson terminated Ms. Bierdeman's employment as an institutional equity salesperson and subjected Ms. Bierdeman to discriminatory conduct in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982) ("Title VII").

The complaint alleges that Ms. Bierdeman was subjected to such conduct due to her female gender and the fact that she took two pregnancy leaves of absence during her employment with Shearson. The complaint asserts that Ms. Bierdeman filed timely charges of discrimination with the California Department of Fair Employment & Housing and the Equal Employment Opportunity Commission ("EEOC"). Ms. Bierdeman's charges of discrimination stated that Shearson contended that Ms. Bierdeman's employment was not terminated due to her female gender or her pregnancy leaves of absence, but rather, due solely to poor work performance. The EEOC, after investigating Ms. Bierdeman's charges of discrimination, issued Ms. Bierdeman a right to sue letter, dated October 3, 1989, and terminated any further processing of the matter.

Shearson served Ms. Bierdeman with an answer to her complaint, dated July 3, 1990, which, among other things: (1) reiterated Shearson's contention that Ms. Bierdeman's employment was terminated due to poor work performance, and (2) maintained that all decisions and actions taken by Shearson with respect to Ms. Bierdeman's employment were based upon reasonable factors which were not related to Ms. Bierdeman's female gender or her pregnancy. Shearson's answer also asserted, as an affirmative defense, that Ms. Bierdeman had agreed to arbitrate any claim that she has against Shearson and she was therefore precluded from maintaining an action against Shearson in the district court.

Shearson also filed a motion in the district court, on or about February 22, 1990, for an order staying proceedings pending arbitration, pursuant to Ms. Bierdeman's contractual obligation to arbitrate any claim that she has against Shearson, as required by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1990) ("FAA"). Shearson based its motion upon an arbitration agreement contained in a contract Ms. Bierdeman executed at the time she became registered as a securities representative.

Specifically, as required by her employment with Shearson, Ms. Bierdeman registered as a securities representative with the New York Stock Exchange, Inc. ("NYSE"), the National Association of Securities Dealers, Inc. ("NASD") and the American Stock Exchange, Inc. ("AMEX").[1] In connection with her registration with these SROs, Ms. Bierdeman executed a registration application, entitled "Uniform Application for Securities Industry Registration," on May 19, 1983. Ms. Bierdeman's registration application provided, among other things, that she:

> agree[d] to arbitrate any dispute, claim or controversy that may arise between me and [Shearson], that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register.

The Constitution and Rules of the SROs with which Ms. Bierdeman registered all contain several provisions requiring Ms. Bierdeman to arbitrate the claims which she has lodged against Shearson, and Shearson relied on these provisions in the lower courts. One such provision is NYSE Rule 347, which provides:

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[1] Shearson is also registered with these self-regulatory organizations ("SRO") as a broker and dealer in securities. The NYSE, for example, defines such a registered corporation as a "member corporation." *See* NYSE Const., Art. I, § 3(h)(i), 2 NYSE Guide (CCH) ¶ 1003. The term "member organization," used throughout the Constitution and Rules of the NYSE, includes the term "member corporation." *See* Rule 2, 2 NYSE Guide (CCH) ¶ 2002.

> Any controversy between a registered representative and any . . . member organization arising out of the employment or termination of employment of such registered representative by and with such . . . member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedures prescribed elsewhere in these rules.

NYSE Rule 347, 2 NYSE Guide (CCH) ¶ 2347.[2]

The district court, on or about June 20, 1990, denied Shearson's motion for a stay of proceedings pending arbitration, holding Title VII claims non-arbitrable as a matter of law. The district court relied on this Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) to support its holding, notwithstanding Shearson's arguments which clearly distinguished the arbitration agreements at issue in, and the principles established by, *Alexander* and its progeny (*i.e.*, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284 (1984)), from the arbitration agreement and principles involved in this case.[3]

Shearson, by notice of appeal dated July 18, 1990,[4] filed an appeal to the United States Court of Appeals for the Ninth Circuit based upon the district court's refusal to require Ms.

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[2] *See also* NYSE Const., Art. XI, § 1, 2 NYSE Guide (CCH) ¶ 1501; NASD Code of Arb. Proc., § 8(a), NASD Manual (CCH) ¶ 3708; AMEX Rule 341.08(10), 2 AMEX Guide (CCH) ¶ 9391.08.

[3] Shearson argued before the district court that these cases represent this Court's labor arbitration precedent which governs arbitration agreements contained in collective-bargaining agreements. Such an agreement is not the kind of commercial arbitration agreement into which Ms. Bierdeman entered which is governed by the FAA and the Court's commercial arbitration precedent represented in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[4] Without having raised the issue in the district court, Ms. Bierdeman argued in the court of appeals that her contractual obligation to arbitrate her disputes

*(footnote continued)*

Bierdeman to arbitrate her Title VII claims. During the pendency of Shearson's appeal, this Court delivered its opinion in *Gilmer*, ruling that: (1) the type of arbitration agreement involved in this case is governed by, and enforceable under, the FAA, (2) the Court's labor arbitration precedent represented in *Alexander*, *Barrentine* and *McDonald* does not apply to such an arbitration agreement, and (3) claims asserted under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1982) ("ADEA") are arbitrable.

Subsequent to *Gilmer*, a panel of the Ninth Circuit Court of Appeals ruled in *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932 (9th Cir. 1992) that the FAA requires enforcement of agreements to arbitrate Title VII claims in light of the broad principles underlying *Gilmer*.

Thereafter, another panel of the Ninth Circuit, in the present case, reversed the district court and ruled that Title VII claims are arbitrable, relying on *Mago* and *Gilmer*.

The court of appeals also rejected Ms. Bierdeman's argument that her agreement to arbitrate her disputes with Shearson was contained in the type of "contract of employment" which is exempt from the FAA since Ms. Bierdeman never raised the argument in the district court, and, more importantly, this argument was rejected by this Court in *Gilmer*.

Ms. Bierdeman subsequently filed a Petition for a Writ of Certiorari ("Petition") with this Court, on or about August 18, 1992, to review the court of appeals' opinion requiring her to arbitrate her Title VII claims.

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*(footnote continued)*

with Shearson is contained in a contract of employment that is exempted from the FAA by § 1 of the statute, notwithstanding the fact that this Court had rejected this precise argument in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

## REASONS FOR DENYING THE WRIT

The Petition argues initially that the Court should grant certiorari to review the court of appeals' ruling that requires Ms. Bierdeman to arbitrate the Title VII claims which she has asserted against Shearson by maintaining that the courts of appeals are in conflict on the issue. *See* Petition at 10. The Petition also argues that certiorari should be granted to resolve an important issue of federal law which concerns the scope of the exclusionary clause contained in § 1 of the FAA and whether Ms. Bierdeman's contractual agreement to arbitrate her disputes with Shearson falls within this clause and is therefore not governed by the FAA. *See* Petition at 11.

Petitioner's arguments in support of her request for certiorari are unpersuasive and do not require the Court to expend its precious resources attendant to the granting of a writ of certiorari for the following reasons: (1) there is no meaningful conflict among the courts of appeals because (a) the Court's opinion in *Gilmer* and ruling in *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), *vacated and remanded*, 111 S. Ct. 2050 (1991), have caused the lower courts universally to recognize that Title VII claims are arbitrable, and (b) the courts of appeals' decisions on which petitioner relies were rendered prior to, and conflict with *Gilmer* and *Alford*; and (2) the second argument advanced by petitioner in support of her request for certiorari was explicitly considered and rejected by the Court in *Gilmer*.

I. **There Exists No Meaningful Conflict Among the Courts of Appeals Regarding the Enforceability of Agreements to Arbitrate Title VII Disputes in Light Of this Court's Rulings in *Gilmer v. Interstate/Johnson Lane Corp.* and *Alford v. Dean Witter Reynolds, Inc.***

The Petition argues that the Court should grant certiorari to resolve a conflict among the courts of appeals regarding the enforceability of agreements to arbitrate Title VII claims. The Petition states that such a conflict exists as a result of the first and eighth circuit courts of appeals' rulings that Title VII claims are non-arbitrable in *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 842 (1990) and *Swenson v. Mgm't. Recruiters Int'l., Inc.*, 858 F.2d 1304 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264, *cert. denied*, 110 U.S. 143 (1989), which conflict with the contrary rulings of the fifth, sixth, and ninth circuit courts of appeals' decisions in *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991), *Willis v. Dean Witter Reynolds,* , 948 F.2d 305 (6th Cir. 1991), *Mago* and the present case. *See* Petition at 10.

Although the first and eighth circuit courts of appeals in *Utley* and *Swenson*, respectively, did rule that Title VII claims are non-arbitrable, they did so prior to this Court's rulings in *Gilmer* and *Alford*. Indeed, every court subsequently ruling on the issue has interpreted *Gilmer* to require enforcement of agreements to arbitrate Title VII claims. *See Willis*, 948 F.2d at 307-12; *Alford*, 939 F.2d at 230; *Mago*, 956 F.2d at 935; *Bender v. Smith Barney, Harris Upham & Co.*, 789 F. Supp. 155, 160 (D.N.J. 1992); *Sacks v. Richardson Greenshields Securities Inc.*, 781 F. Supp. 1475, 1478-83 (E.D. Cal. 1991); *Kaliden v. Shearson Lehman Hutton Inc.*, 789 F. Supp. 179 181-84 (W.D. Pa. 1991); *King v. The First Boston Corp.*, 1992 U.S. Dist. LEXIS 4745, No. 90 Civ. 4319 (CSH) (S.D.N.Y. April 8, 1992).

A review of the Court's rulings in *Gilmer* and *Alford*, as well as the first and eighth circuits' opinions in *Utley* and *Swenson*, reveals clearly why the lower courts have: (1) relied properly

on *Gilmer* and *Alford* in requiring enforcement of agreements to arbitrate Title VII claims, and (2) rejected *Utley* and *Swenson* which are outdated and were implicitly overruled by *Gilmer* and *Alford*. Accordingly, one must reach the inescapable conclusion that granting certiorari is not warranted in this case.

In *Gilmer*, the Court, in examining an arbitration agreement which is virtually identical to the agreement at issue in this case, *see Gilmer*, 111 S.Ct. at 1650-51, found no congressional intent to prohibit agreements to arbitrate ADEA claims, and ruled that such agreements must therefore be enforced under the FAA. In so doing, the Court, among other things, rejected the application of its labor arbitration precedent represented in *Alexander*, *Barrentine* and *McDonald*, governing collective-bargaining arbitration agreements, to private commercial arbitration agreements, such as that at issue in this case, which are governed by the FAA and the Court's commercial arbitration precedent represented in *Rodriguez*, *McMahon* and *Mitsubishi*.

The Court in *Gilmer* instructed that its labor arbitration cases were inapplicable to the type of arbitration agreement involved in this case because: (1) the Court's labor arbitration precedent involved the issue of whether labor arbitration decisions which involved contract-based claims precluded subsequent statutory claims, not the arbitrability of a statutory claim under the FAA,[5] (2) the labor arbitrators involved in those cases, unlike the type of commercial arbitrators who will be resolving this case, did not have the authority to resolve statutory claims, and (3) there exists the possibility that in collective-bargaining arbitration, individual rights may be subordinated to the collective rights of all union members. *See Gilmer*, 111 S.Ct. at 1656-57.

It is thus clear that, in light of *Gilmer*, the Court's labor arbitration precedent is not to be relied on to prohibit enforcement of the type of commercial arbitration agreement at issue in this case which must be enforced under the FAA.

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[5] The Court in *Gilmer* noted that its labor arbitration cases were not decided under the FAA. *See Gilmer*, 111 S. Ct. at 1657. The FAA, in fact, is not even mentioned in these cases.

The Court in *Gilmer*, as it had done in *Rodriguez* and *McMahon*, also rejected arguments opposing arbitration pursuant to SRO arbitration rules and the FAA which attacked the adequacy of this dispute resolution procedure. *See Gilmer*, 111 S. Ct. at 1654-55.

The first and eighth circuit courts of appeals, however, in deciding the issue several years prior to *Gilmer* in *Utley* and *Swenson*, relied on the Court's labor arbitration precedent to prohibit enforcement of an agreement to arbitrate Title VII claims. *See Utley*, 883 F.2d at 185-87; *Swenson*, 858 F.2d at 1305-09. These circuit courts of appeals also relied on what they perceived as the inadequacy of arbitration procedures to resolve Title VII disputes. *See Utley*, 883 F.2d at 187; *Swenson*, 858 F.2d at 1306-07. Any doubt that this approach was improper, or that the Court's opinion in *Gilmer* applies equally to Title VII claims, was resolved resoundingly by its ruling in *Alford*.

Prior to *Gilmer*, the fifth circuit court of appeals, in *Alford*, relied on *Swenson*, *Utley* and the Court's labor arbitration precedent in ruling that agreements to arbitrate Title VII claims are unenforceable. *See Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), *vacated and remanded*, 111 S. Ct. 2050 (1990). After issuing *Gilmer*, the Court, acting upon a Petition for a Writ of Certiorari to review the fifth circuit's ruling in *Alford*, granted certiorari, vacated the fifth circuit's ruling, remanded the case, and instructed the fifth circuit to reconsider its opinion in light of *Gilmer*. *See Dean Witter Reynolds, Inc. v. Alford*, 111 S. Ct. 2050 (1991). In accordance with the obvious meaning of the Court's summary disposition of the Petition in *Alford*, the fifth circuit, on remand, concluded correctly that *Gilmer* required it to render enforceable agreements to arbitrate Title VII claims:

> In *Gilmer*, the Supreme Court decided that a claim under [ADEA] "can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." 111 S. Ct. at 1650.

> Because both the ADEA and Title VII are similar civil rights statutes, and both are enforced by the EEOC, *compare* 29 U.S.C. § 626 with 42 U.S.C. § 2000e-5, we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration. Any broad public policy arguments against such a conclusion were necessarily rejected by *Gilmer*.

*Alford*, 939 F.2d at 230.

Moreover, every court that has analyzed the enforceability of agreements to arbitrate Title VII claims under the FAA subsequent to *Gilmer* has required enforcement of such agreements in light of the rationale underlying *Gilmer*, choosing not to follow the outdated *Swenson* and *Utley* decisions. *See Alford*, 939 F.2d 229 (5th Cir. 1991); *Willis*; *Mago*; *Bierdeman*; *Bender*; *Sacks*; *Kaliden*; *King*. *Swenson* and *Utley*, therefore, are not impeding the ability of parties to have their arbitration agreements enforced by the lower courts nationwide subsequent to *Gilmer*.

There is, thus, no conflict among the courts of appeals that warrants review by the Court in this case regarding the enforceability of agreements to arbitrate Title VII claims.

## II. This Court in *Gilmer* Has Already Resolved the Issue of Whether the Type of Contract Requiring Petitioner to Arbitrate Her Disputes with Respondent is Exempt from the Federal Arbitration Act

The Petition also argues that the Court should review the court of appeals' opinion to resolve an issue that petitioner maintains was not resolved in *Gilmer* and should be resolved by the Court in this case. Specifically, the Petition argues that petitioner's contractual agreement to arbitrate any disputes that she has with Shearson is exempted from the FAA by § 1 of the statute, which provides, in pertinent part:

> [N]othing contained herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. *See* Petition at 10-11. This precise issue, however, has already been explicitly resolved by the Court in *Gilmer*.

*Gilmer* involved the identical arbitration agreement that is involved in this case. The petitioner in *Gilmer*, like the petitioner in this case, executed a securities registration application that contained an agreement to arbitrate any dispute with a member organization such as Shearson in accordance with the arbitration rules of an SRO. The member organization involved in *Gilmer*, like Shearson, relied on NYSE Rule 347 which requires securities registrants such as petitioner to arbitrate any dispute arising out of their employment or termination of employment with a member organization. *See Gilmer*, 111 S. Ct. at 1650-51.

The Court in *Gilmer* ruled that this arbitration agreement was not exempted from the FAA by § 1 of the statute since it is not contained in a "contract of employment." Rather, the Court ruled that the arbitration agreement at issue is contained in the securities registration application which is a contract between the securities registration applicant and the securities exchange, not a contract between the securities registration applicant and the member organization. *See Gilmer*, 111 S. Ct. at 1650-51 n.2.

The Court in *Gilmer*, moreover, also recognized that the lower courts have held uniformly that the exclusionary clause contained in § 1 of the FAA is inapplicable to arbitration clauses contained in securities registration applications, and that the Court implicitly assumed this in *Perry v. Thomas*, 482 U.S. 483 (1987).

Contrary to petitioner's suggestion that this issue was not resolved in *Gilmer*, the Court in *Gilmer* clearly stated:

> [W]e choose to follow the plain language of the FAA, and the weight of authority and we therefore *hold* that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement.

*Gilmer*, 111 S. Ct. at 1652 n. 2 (emphasis added). Accordingly, the court of appeals, in addition to noting that petitioner never raised this issue in the district court, rejected petitioner's baseless

argument that the Court in *Gilmer* did not resolve this issue. *See* A-12. All other courts ruling on the issue have also recognized that the issue was explicitly resolved in *Gilmer* and that the FAA requires enforcement of the type of arbitration agreement involved in this case. *See Alford*, 939 F.2d at 230 n.*; *Willis*, 948 F.2d at 312; *Sacks*, 781 F. Supp. at 1483.

Thus, as the issue concerning the applicability of the FAA to the type of arbitration agreement involved in this case was resolved in *Gilmer*, there is no basis for the Court to grant certiorari to review the issue in this case.

## CONCLUSION

For all of the foregoing reasons, respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari in this case.

DATED: New York, New York
September 18, 1992

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# APPENDIX

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# APPENDIX A

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

*United States Arbitration Act*

9 U.S.C. § 1.

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1 (1990).

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 2000e. Definitions

For the purposes of this subchapter -

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after

March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivison.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in

their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679.

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§ 2000e-2. **Unlawful employment practices**

**Employer practices**

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**Employment agency practices**

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

**Labor organization practices**

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

**Training programs**

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

**Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion**

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

**Members of Communist Party or Communist-action or Communist-front organizations**

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

**National security**

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if -

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

**Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions**

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by a quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race,

color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

**Businesses or enterprises extending preferential treatment to Indians**

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

**Preferential treatment not to be granted on account of existing number or percentage imbalance**

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| LAURYN BIERDEMAN, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | NO. 90-16024 |
| | ) | D.C.# |
| v. | ) | CV-89-4473-RFP |
| | ) | |
| SHEARSON LEHMAN HUTTON INC., | ) | MEMORANDUM* |
| | ) | |
| | ) | (Filed May 28, 1992) |
| Defendant-Appellant. | ) | |
| | ) | |

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding

Argued and Submitted October 7, 1991
San Francisco, California
Submission Deferred October 17, 1991
Resubmitted: May 13, 1992

BEFORE: TANG, REINHARDT, and TROTT, Circuit Judges.

Lauryn Agnew Bierdeman filed suit against her former employer, Shearson Lehman Hutton Inc. ("Shearson"), alleging sex discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1981). At the beginning of her employment with Shearson, Bierdeman executed a Uniform Application for

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Securities Industry Registration. The application form, among other things, required Bierdeman to arbitrate any dispute between Shearson and herself arising out of her employment. Shearson filed a motion for a stay of the district court proceedings pending arbitration. The district court denied the motion on the ground that Title VII cases are not arbitrable. Shearson timely noticed its appeal to this court. We reverse and remand.

This court recently ruled that Title VII disputes are arbitrable. *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) The district court's contrary conclusion was erroneous.

Bierdeman argues, alternatively, that her agreement to arbitrate is not subject to the Federal Arbitration Act because it arises from a contract of employment. The Federal Arbitration Act expressly excludes from its provisions "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1970). We reject Bierdeman's argument for two reasons.

First, this argument was not raised below. We ordinarily will not entertain arguments raised for the first time on appeal. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

Second, the Supreme Court has held that arbitration agreements arising from a securities registration application do not constitute "contracts of employment" within the meaning of 9 U.S.C. § 1, and are in fact subject to the Federal Arbitration Act. *Gilmer v. Interstate/Johnson Lane Corp.*, ____ U.S. ____, 111 S. Ct. 1647, 1651-52 n.2 (1991); *see also Alford v. Dean Witter Reynolds, Inc.*, F.2d 229, 230n.* (5th Cir. 1991).

REVERSED and REMANDED.

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## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 90-16024
CT/AG#: CV-89-4473-RFP

(Filed July 8, 1992)

LAURYN BIERDEMAN

Plaintiff - Appellee

v.

SHEARSON LEHMAN HUTTON INC.

Defendant - Appellant

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APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ____ judgment of the said District Court in this cause be, and hereby is REVERSED and REMENDED [sic].

Filed and entered 05/28/92
A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUN 24 1992

by: Verna Lavin
Deputy Clerk

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## APPENDIX D

LAURYN AGNEW BIERDEMAN,

Plaintiff,

v.

SHEARSON LEHMAN HUTTON, INC.,

Defendant.

NO. C-89-4473 RFP

ORDER

(Filed June 20, 1992)

I INTRODUCTION.

We are presented with a motion by defendant Shearson Lehman Hutton ("Shearson") to stay proceedings and compel arbitration in this sex discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff Lauryn Agnew Bierdeman was employed by Shearson as an institutional equity salesperson. She alleges that Shearson first reduced her compensation and ultimately terminated her employment because of her sex and in retaliation for her twice taking pregnancy leave. After timely submitting her claim to the Equal Employment Opportunity Commission ("EEOC") and receiving a notice of right to sue, Bierdeman filed this action in federal district court. She has refused to submit to arbitration, arguing that the Title VII statute and judicial authority interpreting it entitle her to pursue a remedy in federal court without first submitting her grievance to binding arbitration.

Defendant Shearson now moves to stay Bierdeman's action and to compel her to submit her claim to arbitration. Shearson argues that Bierdeman is contractually bound to arbitrate her claim by the constitutions and regulations of the New York Stock Exchange ("NYSE"), National Association of Securities Dealers ("NASD"), and American Stock Exchange ("AMEX"), which she agreed to comply with when she accepted employment with defendant. Shearson wants Bierdeman to submit to arbitration as provided by the rules of these organizations.

Shearson attempts to distinguish Supreme Court authority holding that arbitration agreements cannot prevent Title VII plaintiffs from pursuing their remedies in federal court. In doing so, Shearson separates the Supreme Court's decisions on the arbitrability of various statutory claims into decisions involving collective bargaining agreements and decisions involving privately negotiated commercial arbitration agreements such as those implicated here. While this categorization allows Shearson to distinguish Supreme Court precedent holding that Title VII plaintiffs do not waive their right to a judicial remedy by signing an arbitration agreement, it is nevertheless spurious. The decisions which Shearson relies upon in arguing for enforcement of the NYSE, NASD, and AMEX arbitration provision without exception involve statutes other than Title VII.

## II. BACKGROUND.

Plaintiff Lauryn Bierdeman went to work for Lehman Brothers in May, 1983, as an institutional equity salesperson. The following year, defendant Shearson acquired Lehman Brothers. When plaintiff accepted her position, she signed an agreement which provided in pertinent part, "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . ." Shearson alleges that plaintiff then registered with the NYSE, the NASD, and AMEX, and that the constitutions and rules of those organizations require her to arbitrate her claim.

Bierdeman claims that Shearson discriminated against her on the basis of her sex; specifically, she contends that her bonus compensation was cut and that she was eventually terminated because she took pregnancy leave. Bierdeman was the only female employee in Shearson's West Coast Equity Sales Department. She took two three-month pregnancy leaves during the time she was employed by Shearson — the first from October through December of 1985, and the second from May through July of 1987. She alleges that her supervisors reduced the number of accounts that she managed and reduced the number of "bonus

points" she received after her first pregnancy leave. After her second leave, she alleges that her bonus points were again cut and that Shearson removed a Quotron machine which she contends she needed in order to be able to perform her job. She was terminated in December 1987 and replaced with a male employee on the same day.

Bierdeman contends that Shearson agents and employees told her that her pregnancy leaves were not in the company's best interests. She contends that she heard through a client that Shearson told the client she was terminated because she preferred to be at home with her children.

Bierdeman filed a complaint with the EEOC and received a notice of right to sue. She timely filed this action on December 18, 1989. Shearson has formally demanded that Bierdeman submit her grievance to arbitration. Demand Letter, Declaration of Jeffrey L. Friedman at Exhibit 2. Plaintiff maintains that she is not compelled to do this.

III. DISCUSSION.

Defendant Shearson's position is that plaintiff agreed at the time of accepting employment to submit any complaints against Shearson to arbitration. In support of this position, Shearson relies upon her agreement, quoted above, to comply with the arbitration regulations of any self-regulating organizations ("SRO's") of securities brokers that she registered with.

Bierdeman registered with the NYSE, the NASD and AMEX. Declaration of Jeffrey L. Friedman at ¶7 and at Exhibit 1. NYSE Rule 600(a) provides that any dispute or claim arising between a member organization and an "associated person" of that member organization shall be submitted to arbitration. The NASD Code of Arbitration Procedure §8(a) similarly provides for the submission to arbitration of "any dispute, claim, or controversy arising out of or in connection with the business of any member of the association." Shearson asserts that the AMEX arbitration rules also bind plaintiff to submit to arbitration. Ninth Circuit authority holds that the arbitration provisions contained

in the rules of the various SRO's have contractual force. *Muh v. Newberger, Loeb, & Co., Inc.*, 540 F.2d 970, 973 (9th Cir. 1976). Therefore, we find that Shearson has made a *prima facie* showing that a contract existed between it and Bierdeman requiring that she submit any grievances between her and Shearson to arbitration by the procedures set up by one of the SRO's.[1]

However, even if Bierdeman's agreement to submit disputes with Shearson to arbitration in accordance with SRO rules constitutes a valid contract, it nevertheless is unenforceable. A line of Supreme Court cases holds that a Title VII plaintiff does not prospectively waive her right to pursue relief in federal court when she agrees to arbitration of disputes.

The seminal case in this area is *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In *Alexander*, the Court held that a prior arbitration decision finding that the plaintiff's claim had no merit could not foreclose plaintiff's right to bring a Title VII race discrimination case in federal court. The Court wrote:

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the non-discrimination clause of a collective bargaining agreement. 415 U.S. 47-49.

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[1] We assume for purposes of argument, but do not decide, that this agreement is valid. Plaintiff has challenged the validity of the agreement to submit to arbitration, characterizing it as a contract of adhesion. While the Ninth Circuit has rejected the proposition that NASD and NYSE arbitration agreements can be defined as unconscionable as a matter of law, *Cohen v. Wedbush, Noble, Cooke & Co.*, 841 F.2d 282, 286 (9th Cir. 1988), the possibility remains that such agreements could be found unconscionable under certain circumstances. Determining whether plaintiff truly lacked meaningful power to refuse the arbitration provision or to bargain over its terms, however, would require an evidentiary hearing. Because we dispose of this motion on the grounds discussed below, we find that it is unnecessary to conduct such a hearing.

So long as the plaintiff satisfied the Title VII jurisdictional requirements of presenting his claim to the EEOC and receiving a notice of right to sue, the claim could be litigated in federal court despite the arbitrator's decision. *Id.* at 45.

The Supreme Court elaborated on *Alexander* in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), when it held that an adverse arbitration decision had no preclusive effect on a Fair Labor Standards Act plaintiff's right to litigate based on the same facts submitted to arbitration. The *Barrentine* Court distinguished between contractual rights and statutory rights "designed to provide minimum substantive guarantees to individual workers," finding that the latter were so significant that courts should not defer to arbitral decisions.

While the Supreme Court did not directly hold in *Alexander* that agreements to submit to arbitration of claims arising under Title VII are not enforceable, other Circuits have applied the *Alexander* line of cases to this effect. In *Swenson v. Management Recruiters*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143 (1989), the Eighth Circuit relied on *Alexander* to find that Title VII claims were simply not subject to arbitration, finding that "Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration agreements." 858 F.2d at 1306. Similarly, the First Circuit held in *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 842 (1989), that an employee cannot prospectively waive her rights to sue under Title VII even where she signs an arbitration agreement. It should be noted that the *Utley* case is directly on point, in that it involved a female employee bringing a sex discrimination suit which the employer asserted was subject to arbitration under stock exchange rules because of the same type of U-4 form agreement at issue here.

Shearson appears to admit that *Alexander* renders Title VII claims non-arbitrable; however, it attempts to argue that *Alexander* should be limited to the collective bargaining agreement context. In doing so, Shearson focuses not on the distinction between Supreme Court precedent on arbitration of Title VII as

opposed to other types of claims, but on the distinction between arbitration agreements in the group as opposed to the individual context. Shearson relies on several Supreme Court cases finding that private commercial arbitrations agreements were enforceable. None of the cases cited were in the Title VII context, however. *See e.g., Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (Sherman Act); *Shearson American Express v. McMahon*, 482 U.S. 220 (Civil RICO treble damages claim); *Rodriguez de Quijas v. Shearson American Express*, 490 U.S. ____, 104 L.Ed.2d. 526 (1989) (Securities Exhcange Act claim).

Drawing this distinction between the collective bargaining and private arbitration agreement context has been rejected in two other circuits as an incorrect interpretation of *Alexander*. The Eighth Circuit in *Swenson*, for example, found that *Alexander* "turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII." 858 F.2d at 1306. In *Utley*, the First Circuit also found that *Alexander* turned on the Title VII issue and could not be distinguished on grounds that it applied only to agreements to arbitrate contained in collective bargaining agreements.

We note that some time was devoted to oral argument to discussion of the persuasive effect of various cases regarding the arbitrability of discrimination claims arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 *et seq.* Having reviewed the cases cited by the parties, we do not find support in this line of reasoning for Shearson's position on the arbitrability of ADEA claims. While the Fourth Circuit has held ADEA claims to be arbitrable, *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), the Third Circuit has held them to be non-arbitrable, *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3rd Cir. 1989).

Second, the court is not persuaded that even those courts finding ADEA claims arbitrable would apply the same reasoning to Title VII claims. For example, in *Gilmer*, the Fourth Circuit noted than an arbitration agreement would be unenforceable where "Congress has evinced an intention to preclude

waiver of the judicial forum for a particular statutory right." 895 F.2d at 197. While the Fourth Circuit found no indication of such Congressional intention with respect to ADEA, the Supreme Court found that such intention exists with respect to Title VII claims. *Alexander*, 415 U.S. at 51-52. Thus, we do not find the Fourth Circuit's decision in *Gilmer* persuasive on the question of whether arbitration of Title VII claims should be compelled.

Finally and most significantly, Ninth Circuit authority conflicts with Shearson's position. In *Criswell v. Western Airlines*, 709 F.2d 544 (1983), the Ninth Circuit relied on the Supreme Court's decision in *Alexander* to reject deference to an arbitral decision in an ADEA case. In doing so, the court specifically drew the analogy between ADEA and Title VII claims. 709 F.2d at 548. Given that the Ninth Circuit has disfavored arbitration of ADEA claims on the rationale that the Supreme Court does not compel deference to arbitral decisions in the Title VII context, we find Shearson's argument regarding ADEA unpersuasive.

IV. CONCLUSION.

For the reasons set forth above, we find that plaintiff could not prospectively waive her right to a judicial determination of her Title VII claim. Accordingly, defendant's motion to stay proceedings and compel arbitration is hereby denied.

IT IS SO ORDERED.

DATED: June 20, 1990.

/s/ Robert F. Peckham
United States
District Judge

C-89-4473 RFP LAURYN AGNEW BIERDEMAN VS. SHEARSON LEHMAN HUTTON

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned deputy clerk, declare under penalty of perjury that I served the following document(s) as listed below by enclosing a true copy of said document(s) in a separate postage paid, sealed envelope and to-day placing the said envelope in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California, addressed as follows:

Kathleen Lucas-Wallace, Esq. (415) 433 6166
Deborah C. England, Esq.
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Peter R. Boutin, Esq. (415) 989 0616
Lisa M. Bertain, Esq.
KEESAL, YOUNG & LOGAN
Four Embarcadero Center, Suite 1500
San Francisco, CA 94111

1) ORDER DENYING DEFENDANT'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

DATED: June 21, 1990

/s/ Illegible
Deputy Clerk